

**North Shore University Hospital and New York State Nurses Association. Cases 29-CA-6398 and 29-RC-3989**

December 29, 1981

**DECISION AND ORDER**

**BY MEMBERS FANNING, JENKINS, AND  
ZIMMERMAN**

On May 13, 1981, Administrative Law Judge Jesse Kleiman issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief,<sup>1</sup> and the Charging Party filed cross-exceptions and a brief in support of its cross-exceptions and in opposition to Respondent's exceptions. Respondent also filed a brief in answer to the Charging Party's cross-exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

**ORDER**

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, North Shore University Hospital, Manhasset, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

<sup>1</sup> Respondent has requested oral argument. This request is hereby denied as the record, the exceptions, and the briefs adequately present the issues and the positions of the parties.

**APPENDIX**

**NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government**

**WE WILL NOT** refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with New York State Nurses Association, as the exclusive representative of the employees in the bargaining unit described below.

**WE WILL NOT** in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

**WE WILL**, upon request, bargain with the above-named labor organization, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All full-time and regular part-time registered professional nurses regularly scheduled to work 22-1/2 hours or more per week, including all those authorized by permit to practice as registered nurses, employed by us at 300 Community Drive, Manhasset, New York; excluding all department heads, administrative directors, directors, associate directors, assistant directors, all supervisors, clinical supervisors, all clinicians, all instructors, all specialists, operating rooms nurse specialists, all coordinators, head nurses, assistant head nurses, all casual employees, temporary employees, confidential employees, managerial employees, all other employees, and guards and supervisors as defined in the Act.

**NORTH SHORE UNIVERSITY HOSPITAL**

**DECISION**

**STATEMENT OF THE CASE**

JESSE KLEIMAN, Administrative Law Judge: Upon a charge filed in Case 29-CA-6398 on May 8, 1978, by New York State Nurses Association, also referred to herein either as the Association or as NYSNA, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 29, Brooklyn, New York, duly issued a complaint and notice of hearing on June 15, 1978, against North Shore University Hospital, herein called the Respondent, alleging that the Respondent engaged in certain unfair labor practices within the meaning of Section 8(a)(1) and (5) of the National Labor Relations Act, as amended, herein referred to as the Act. On July 17, 1978,<sup>1</sup> the Respondent, by counsel, duly filed an answer denying the material allegations in the complaint and raising certain affirmative defenses.<sup>2</sup>

<sup>1</sup> The Respondent's time to serve an answer was extended to this date by the Regional Director for Region 29 by order dated June 27, 1978.

<sup>2</sup> The Respondent contends that:

*Continued*

Prior thereto, on September 26, 1977, the Association had filed a petition for certification of representative with the Board in Case 29-RC-3989 seeking an election among all the Respondent's full-time and regular part-time registered professional nurses and persons authorized by permit to practice as registered professional nurses excluding "managerial, confidential and supervisory employees as defined by the Act, guards, watchmen and all other employees." The parties executed a Stipulation for Certification Upon Consent Election on October 7, 1977. By order dated November 11, 1977, the Regional Director for Region 29 denied the Respondent's motion to reopen the hearing in Case 29-RC-3989 or in the alternative to withdraw from the Stipulation for Certification Upon Consent Election.<sup>3</sup>

An election by secret ballot was conducted on November 16, 1977, among all the Respondent's unit employees in which 368 votes were cast for the Association, 96 votes cast against the participating labor organization, and 15 ballots were challenged. On November 23, 1977, the Respondent filed timely objections to the election alleging, in substance, that the Association is not a labor organization within the meaning of the Act because its actions are controlled, directed, and/or influenced by persons who occupy supervisory positions within health care institutions including the Respondent and that the Board has no jurisdiction, therefore, and if the Association is a labor organization under the Act, it committed "objectionable pre-election conduct" by obtaining employee support under the "false pretense" that it is a "professional organization as distinguished from a union and/or labor organization." The Regional Director for Region 29 on January 23, 1978, issued a report on objections in which he recommended that each of the Respondent's objections be overruled and that a Certifi-

cation of Representative issue to the Association.<sup>4</sup> The Respondent filed no exceptions to the report on objections.

The Board on February 21, 1978, certified the Association as the exclusive representative of all the employees in the appropriate unit with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.<sup>5</sup>

On July 17, 1978, the Respondent filed a motion to revoke certification in Case 29-RC-3989 alleging *inter alia* that the Association is "influenced, dominated and controlled by supervisors who serve as both officers and directors of the Association, which [the Association] has not delegated its bargaining authority to an autonomous local chapter" and therefore that the Association is not a bona fide labor organization. By order dated August 9, 1978, the Regional Director for Region 29, at the request of the parties, consolidated Cases 29-CA-6398 and 29-RC-3989 for the purposes of hearing.

A hearing in the consolidated cases was duly held before me in Brooklyn, New York, commencing on November 27, 1978, and concluding on March 23, 1979.<sup>6</sup> At the commencement of the hearing, during its course, and at the conclusion thereof, various motions were made by the parties.<sup>7</sup> In substance these motions were as follows: The Respondent moved that its motion to revoke certification in Case 29-RC-3989 be granted and for dismissal

<sup>4</sup> The Regional Director for Region 29 found that the Respondent's "objections" addressed to the Association's status as a bona fide labor organization "are not objections" as defined in Sec. 102.69 of the Board's Rules and Regulations, Series 8, as amended, and that "Under established Board policy, the Employer may revive the issue by a motion to revoke the labor organization's certification or in an appropriate unfair labor practice proceeding." *Sisters of Charity of Providence, St. Ignatius Province, d/b/a St. Patrick Hospital*, 225 NLRB 799 (1976); *Sierra Vista Hospital, supra*; *Handy Andy, Inc., supra*.

<sup>5</sup> The unit found appropriate by the Board for the purposes of collective bargaining was:

All full-time and regular part-time registered professional nurses regularly scheduled to work 22-1/2 hours or more per week, including all those authorized by permit to practice as registered nurses, employed by the employer at 300 Community Drive, Manhasset, New York; excluding all department heads, administrative directors, directors, associate directors, assistant directors, all supervisors, clinical supervisors, all clinicians, all instructors, all specialists, operating rooms nurse specialists, all coordinators, head nurses, assistant head nurses, all casual employees, temporary employees, confidential employees, managerial employees, all other employees, and guards and supervisors as defined in the Act.

The complaint alleges, the Respondent's answer admits, and, as the Board previously found in Case 29-RC-3981, I find that the above-described unit is appropriate for the purposes of collective bargaining within the meaning of Sec. 9(b) of the Act.

<sup>6</sup> The hearing covered 29 days with a record of 3,733 pages and a substantial number of exhibits.

<sup>7</sup> It should be noted that the General Counsel maintained a somewhat unique position of "neutrality" concerning both the procedural aspects of the hearing and the substantive issues presented therein despite its burden of proof with regard to the allegations set forth in the complaint. However, counsel for the General Counsel did move at the beginning of the hearing to strike the second affirmative defense in the Respondent's answer which alleges that by demanding bargaining and the execution of a collective-bargaining agreement the Association engaged in unfair labor practices within the meaning of Secs. 8(b)(1)(A) and 2(6) and (7) of the Act. I reserved decision on this motion. As the reason therefor will become apparent from the subsequent discussion herein of the issues in this case, I find the Respondent's second affirmative defense to be without merit and grant the motion to strike this defense.

(1) New York State Nurses Association "is not a bona fide labor organization qualified to be the unit employees' exclusive collective bargaining representative within the meaning of the Act because its actions are controlled, directed, dominated and/or influenced by persons who occupy supervisory positions within health care institutions, including Respondent."

(2) By demanding that Respondent bargain and enter into a collective bargaining agreement with the Association, the Association has engaged and is engaged in unfair labor practices affecting commerce within the meaning of Section 8(b)(1)(A) and Sections 2(6) and (7) of the Act.

The Respondent filed an amended answer herein on July 24, 1978.

<sup>3</sup> The Regional Director for Region 29 denied the motion for the following reasons: That it was not timely made since it was filed long after the election agreement was entered into and approved and there was no evidence that the issues raised then could not have been raised at the time the election agreement was signed, *Nebraska Methodist Hospital*, 218 NLRB 619 (1975); that no extraordinary circumstances were present to warrant a hearing at this time and that the Board had found the Association to be a labor organization in previous cases and the Respondent had not indicated that it had any evidence to refute this, albeit it was seeking to reopen the hearing on the basis that the Association was dominated by "management and/or supervisory personnel with respect to its representation activity and concerning the status of the [Association] as a labor organization," *Catholic Medical Center of Brooklyn and Queens, Inc., St. John's Hospital Division*, Case 29-RC-3738; *Maimonides Hospital Center*, Case 29-UC-89; *The New York State Nurses Association*, 232 NLRB 849 (1977); and that, in the event that the Association is certified by the Board, a motion to revoke the certification could be filed or the issue considered in an appropriate unfair labor practice proceeding. *Sierra Vista Hospital, Inc.*, 225 NLRB 1086 (1976); *Handy Andy, Inc.*, 228 NLRB 447 (1977).

of the complaint in Case 29-CA-6398; the Association moved for a dismissal of the Respondent's motion to revoke certification and that the complaint herein be sustained, seeking a bargaining order and several extraordinary remedies in addition thereto. I initially denied these motions and upon the renewal thereof reserved decision thereon. The Respondent also moved to amend the first affirmative defense in its amended answer and its motion to revoke certification to include therein "managerial" as well as "supervisory" employees in alleging unlawful control, direction, domination, and/or influence of the Association by persons occupying such positions within health care institutions including the Respondent's hospital. I granted the Respondent's motion to amend.

All parties were afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, to argue orally on the record, and to file briefs. Thereafter, briefs were filed by the Respondent and the Association.<sup>8</sup> In its brief the Respondent seeks dismissal of the complaint and the granting of its motion to revoke the Association's certification. The Association in its brief asserts that

... the Hospital's Motion to Revoke the Association's Certification should be denied and the Hospital should be ordered to bargain in good faith with the Association. In addition, as the Hospital's "domination" defense is plainly frivolous, the Association should be awarded the extraordinary relief specified at p. 78, *supra* or alternatively, the record should be reopened to receive the evidence of the Hospital's election interference and unfair labor practices specified in the Association's offer of proof, pp. 79-82, *supra*.<sup>9</sup>

For the reasons hereinafter set forth I deny the Respondent's motions both to revoke certification in Case 29-RC-3989 and to dismiss the complaint in Case 39-CA-6398 in their entirety, and grant the Association's motions concerning the above but only in part as to the

<sup>8</sup> Robert H. Jones III, counsel for the Association, died on October 24, 1979, and in view of this and the length of the record in this proceeding, the Association's time to file briefs was extended to April 17, 1980.

<sup>9</sup> The following extraordinary remedies are sought by the Association:

- (1) expenses incurred in the investigation, preparation, presentation, and conduct of these cases, including reasonable counsel fees, witness fees, transcript and record costs, travel expenses and per diem, and other reasonable costs and expenses;
- (2) the Hospital should be ordered to mail copies of the "Notice to Employees" to each of the employees in the bargaining unit at his or her home;
- (3) the Hospital's Personnel Administrator should be ordered personally to read the "Notice to Employees" to the members of the bargaining unit of the Hospital, in the presence of representatives of the Association and the Board;
- (4) the Association should be granted access to the Hospital's bulletin boards and premises during the entire period of contract negotiations;
- (5) all terms of any contract agreed to in collective bargaining, including but not limited to wages and benefits, should be made retroactive to the date of the election;
- (6) the Hospital should be ordered to reimburse the Association for lost dues and initiation fees since the election and to reimburse employee-members who have paid such dues and initiation fees to the Association while the Hospital was engaged in its unlawful refusal to bargain.

remedy the Association seeks therein, as hereinafter set forth.

Upon the entire record and the briefs of the parties, and upon my observation of the witnesses, I make the following:

## FINDINGS OF FACT

### I. THE BUSINESS OF THE RESPONDENT

The Respondent, at all times material herein, has been a corporation organized under and existing by virtue of the laws of the State of New York, maintaining its principal office and place of business at 300 Community Drive, in the town of Manhasset, county of Nassau, and State of New York, where it is, and has been at all times material herein, continuously engaged in the operation of a hospital and in providing hospital and health care services and related services. In the course and conduct of the Respondent's business operations during the preceding 12 months, these operations being representative of the operations at all times material herein, the Respondent derived gross revenues therefrom in excess of \$250,000 and purchased and caused to be transported and delivered to its Manhasset hospital medical supplies, goods, and equipment valued in excess of \$50,000 in interstate commerce directly from States of the United States other than the State of New York. The complaint alleges, the Respondent admits, and I find that the Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

### II. THE LABOR ORGANIZATION INVOLVED

The Respondent alleges that the New York State Nurses Association,

... is not a *bona fide* labor organization qualified to be the unit employees' exclusive collective bargaining representative within the meaning of the Act because its actions are controlled, directed, dominated and/or influenced by persons who occupy supervisory and/or management positions within health care institutions and/or other institutions.

The Respondent therefore maintains that since the Association is not a "bona fide" organization under the Act<sup>10</sup> it cannot "be forced to bargain" with the Association. The Respondent further asserts that the Association is not, albeit its certification by the Board as the bargaining representative of the Respondent's nurses in an appropriate unit, "qualified to remain the bargaining representative of a unit which is dominated, controlled and influenced by supervisors both at [North Shore University Hospital] and at other institutions through the [Association]." The Association contends that it is a labor organization within the meaning of the Act and as such is fully qualified to act as the collective-bargaining representative of the nurses' unit at the Respondent's hospital pursuant to the Board's certification thereof.

<sup>10</sup> Sec. 2(5) of the Act, as amended.

The question of statutory labor organization status is, however, distinct from the question of a statutory labor organization's qualifications to act as a bargaining representative in all instances and without regard to the circumstances under which bargaining takes place or will take place.<sup>11</sup> As the Board held in *Sierra Vista Hospital, Inc.*, 241 NLRB 631 (1979):

[T]he mere presence of supervisors in a labor organization is virtually irrelevant to determining status under Section 2(5) of the Act. Indeed, we have, with court approval, uniformly construed Section 2(5) to reach all associations which exist for the purpose, in whole or in part, of collective bargaining and which admit employees to membership, despite the fact that supervisors, in addition to employees and even in substantial numbers, may likewise be admitted.<sup>14</sup>

As long as nurse-employees participate in the association and one of its purposes is representing employees in collective bargaining, a nurses' association, like any other, meets the definition of "labor organization" in Section 2(5) of the Act.<sup>12</sup>

<sup>14</sup> *International Organization of Masters, Mates and Pilots of America, Inc., AFL-CIO (Chicago Calumet Stevedoring Co., Inc.)*, 144 NLRB 1172, 1177 (1963).

The evidence herein clearly shows that the Association is an organization in which employees meaningfully participate and which exists in part for the purpose of dealing with employers concerning wages, hours, and terms and conditions of employment; and that it has, in fact, negotiated collective-bargaining agreements with employers.<sup>13</sup> Accordingly, I find that the New York State Nurses Association is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.<sup>14</sup>

<sup>11</sup> The issue of the Association's qualifications to act as the bargaining representative of the Respondent's nurses in an appropriate unit will be considered in a different part of this Decision.

<sup>12</sup> *Abington Memorial Hospital*, 250 NLRB 682 (1980); *N. T. Enloe Memorial Hospital*, 250 NLRB 583 (1980); *Lodi Memorial Hospital Association, Inc.*, 249 NLRB 786 (1980); *Albert Einstein Medical Center*, 248 NLRB 63 (1980); *Lancaster Osteopathic Hospital Association, Inc.*, 246 NLRB 600 (1979); *Oak Ridge Hospital of the United Methodist Church*, 220 NLRB 49 (1975); *Carle Clinic Association*, 192 NLRB 512 (1971). Also see *Sav-On Drugs, Inc.*, 243 NLRB 859 (1979).

<sup>13</sup> Catheryne Welch, the Association's deputy director for programs, testified uncontradictedly that at the time of the hearing the Association had about 29,000 registered professional nurse members of whom approximately 25,000 are represented by it for purposes of collective bargaining in approximately 115 bargaining units at public and private health care and related facilities located throughout New York State. Further, the Association's certificate of incorporation was amended in or about 1950 to add, as an additional purpose, the power to act as the collective-bargaining representative of registered professional nurses with their employers concerning wages, hours, and terms and conditions of employment. Also see Welch's testimony regarding the participation of the nurses in the collective-bargaining process as will be more fully set forth hereinafter.

<sup>14</sup> Additionally, it should be noted that the Board has previously found The Association to be a labor organization within the meaning of the Act. *The New York State Nurses Association*, 232 NLRB 849 (1977). Also see *Lutheran Medical Center*, Case 29-RC-4543 (1979); *Jewish Hospital Medical Center of Brooklyn Nursing Home*, Case 29-RC-4528 (1979); *The Catholic Medical Center of Brooklyn and Queens, Inc., St. John's Queens Hospital Division*, Case 29-RC-3738 (1977).

## II. THE UNFAIR LABOR PRACTICES<sup>15</sup>

The complaint alleges, in substance, that the Respondent violated Section 8(a)(5) and (1) of the Act<sup>16</sup> by refus-

<sup>15</sup> The Association in its brief asserts that:

The Hospital in this proceeding is seeking to raise issues concerning the propriety of the Association's representation of its registered nurses long after those very issues were waived by the Hospital by its entering into the Stipulation for Certification Upon Consent Election. To even consider the merits of the Hospital's contention at this time would violate a long line of NLRB decisions forbidding the wasteful practice of litigating allegations which could have been asserted but which were waived by an employer. The fact is that the Hospital, with competent legal counsel advising it, stipulated to an election.

A respondent in a Section 8(a)(5) proceeding is not entitled to relitigate issues which were or could have been litigated in the prior representation proceeding.

The Association cites a multitude of cases in support of its assertion which correctly stand for the proposition against relitigation, i.e., *R. W. Harmon & Sons, Inc.*, 246 NLRB 223 (1979); *H. M. Patterson & Son, Inc.*, 245 NLRB 1412 (1979); *The Standard Register Company*, 243 NLRB 300 (1979); *Colorflo Decorator Products, Inc.*, 240 NLRB 1134 (1979); *Gould, Inc., Electrical Components Division*, 237 NLRB 66 (1978).

However, the Board's Supplemental Decision and Order in *Sierra Vista Hospital, Inc.*, *supra*, compels a rejection of the Association's above contention in this matter. A procedural account of what transpired in the various *Sierra Vista Hospital* cases is instructive:

After a hearing held in Cases 1-RC-3166 the Regional Director directed an election in a unit consisting of registered nurses. *Sierra Vista Hospital, Inc.*, the employer therein, filed a request for review of the Regional Director's decision. The Board denied the employer's request for review "as it raised no substantial issues," and noted that "in the event the Petitioner is certified and does not delegate its bargaining authority to a local autonomous chapter controlled by nonsupervisory employees, a motion to revoke the certification will be entertained." The election was held, the California Nurses Association (CNA) won, and the Board certified it as the exclusive collective-bargaining representative of the employer's registered nurses in an appropriate unit. The employer then filed with the Board a motion to revoke certification alleging that the CNA had failed to delegate its bargaining authority to a local autonomous chapter controlled by nonsupervisory employees. The Board remanded the case to the Regional Director to adduce further evidence, particularly concerning the CNA's negotiating procedure and the degree of participation of supervisory nurses in the bargaining process. Thereafter the Board denied the employer's motion to revoke certification as being unmeritorious. (225 NLRB 1086 (1976).)

The employer refused to bargain with CNA, and the latter consequently filed a charge in Case 31-CA-5760, upon which the Regional Director issued a complaint alleging that the employer had violated Sec. 8(a)(5) and (1) of the Act. Thereafter, the General Counsel filed a Motion for Summary Judgment, which was granted by the Board (229 NLRB 232, 233 (1977)). The Board stated therein:

It thus appears that Respondent is attempting to raise in the instant unfair labor practice proceeding matters which were raised and resolved in the underlying representation case.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.<sup>4</sup> [None of the above circumstances were shown to be present or applicable.]

<sup>4</sup> See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

Thereafter in view of the decision of the United States Court of Appeals for the Fourth Circuit in *N.L.R.B. v. Annapolis Emergency Hospital Association, Inc., d/b/a Anne Arundel General Hospital*, 561 F.2d 524 (1977), the Board requested the Court of Appeals for the Ninth Circuit, before which the *Sierra Vista Hospital, Inc.*, case (Case 31-CA-5750) was now pending *vis-a-vis*, petition and cross-petition for review and for enforcement, respectively, to remand the case to the Board for reconsideration.

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ing and continuing to refuse to recognize and bargain collectively with the Association as the Board-certified exclusive collective-bargaining representative of the Respondent's employees in an appropriate unit. The Respondent denies these allegations and asserts as an affirmative defense that the Association is not qualified to act as the collective-bargaining representative of the nurses in the appropriate unit because the Association is dominated, controlled, directed, and/or influenced by persons who occupy supervisory and/or management positions within the Respondent's hospital and/or other health care institutions.

#### A. Background

As set forth hereinbefore, the Board certified the Association as the exclusive collective-bargaining repre-

ation. The court granted the Board's request and remanded the case to it. The Board then decided to reopen the representation proceeding (Case 31-RC-3166) and consolidate it with the unfair labor practice proceeding (Case 31-CA-5760) in order to reconsider the issues posed therein, disavowing and discarding its previous "conditional certification approach" to resolving the problems created by the participation of supervisors in nurses associations as labor organizations and setting forth the standards by which to thereafter resolve such issues as will be discussed more fully hereinafter. The Board's order therein rescinded its prior decisions and orders in Case 31-RC-3166 and Case 31-CA-5750 and directed that a hearing be held for the purpose of receiving evidence "to resolve issues raised by Respondent's motion to revoke certification in Case 31-RC-3166, namely, whether or not the presence of supervisors as officers in, on the board of directors of, or in other positions of authority to speak for or bargain on behalf of CNA disqualifies that association as the collective-bargaining representative of Respondent's nonsupervisory nurses." (241 NLRB 631, 635 (1979).)

The obvious similarity between what occurred therein and what occurred in the instant case, excepting the consent election stipulation herein, is clear. Since the decision in the *Sierra Vista Hospital, Inc.* case came after the hearing was concluded in the instant case and dictates a need for considering the effect, if any, that supervisors or managers, who are members, have upon the NYSNA's collective-bargaining functions, I do not find that the Respondent waived its right to present such evidence, especially in view of the necessity imposed by *Sierra Vista* upon the Respondent to meet a "heavy burden" of establishing the disqualification of the Association as a certified collective-bargaining representative because of a "danger of a conflict of interest interfering with the collective-bargaining process," by entering into a Stipulation for Certification Upon Consent Election in the representation case. It might well be argued that what procedurally occurred herein has created "special circumstances" warranting the holding of such a hearing.

Normally, pursuant to *Sierra Vista Hospital*, the hearing would have been held in the representation case upon remand to the Regional Director by the Board pursuant to the Respondent's motion to revoke certification. But in the instant case the parties themselves requested that the representation case and the unfair labor practice case, Cases 31-RC-3166 and 31-CA-5750, respectively, be consolidated and set for formal hearing before an administrative law judge, which was done.

In view of all of the above, consideration of the merits of the issues presented herein does not violate the Board's "relitigation prohibition." This is not to say that future cases involving challenges to the qualification of nurses associations on the basis of alleged supervisory or managerial nomination will not require employers to raise and litigate these very issues within the confines of the representation case now that *Sierra Vista Hospital* is applicable thereto. In fact, the Board's Second Supplemental Decision and Order in Case 31-RC-3166 (249 NLRB 602 (1980)), and its Notice To Show Cause in Case 31-CA-5750 (249 NLRB 603 (1980)), both involving the *Sierra Vista Hospital, Inc.*, and CNA, strongly indicate that this will be so.

<sup>16</sup> Sec. 8(a)(5) of the Act prohibits an employer from refusing to bargain collectively with the collective-bargaining representative of its employees. Sec. 8(a)(1) of the Act prohibits an employer from interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed in Sec. 7 of the Act.

sentative of the Respondent's registered professional nurses in an appropriate unit on February 21, 1978. On or about April 18, 1978, the Association requested the Respondent to recognize it as the bargaining representative of the Respondent's employees in the nurses' unit and to bargain collectively with it with respect to these employees' rates of pay, wages, hours of employment, and other terms and conditions of employment. The Respondent, on or about April 21, 1978, and continuing thereafter, refused and continues to refuse to recognize and bargain with the Association. As legal justification for its actions the Respondent maintains that the Association is disqualified from acting as the collective-bargaining representative of its registered professional nurse employees in the appropriate unit because the Association's "actions are controlled, directed, dominated and/or influenced by persons who occupy supervisory and/or managerial positions within health care institutions, including Respondent."

#### B. The Evidence<sup>17</sup>

The New York State Nurses Association is a professional membership corporation created and existing under the not-for-profit corporation law of the State of New York, admitting into membership any person "licensed or otherwise duly authorized to practice as a registered professional nurse."<sup>18</sup> The Association's primary objective is "to further the efficient care of the sick, disabled and others needing nursing care." As a secondary purpose and to assist in effectuating its primary objective the Association seeks "to advance the educational and professional standards of nursing" and as one of the means to this end "concerns itself with the economic and general welfare of nurses" through representation of licensed professional nurse units for purposes of collective bargaining.<sup>19</sup>

#### 1. The organization of the Association

##### a. The Association's board of directors

The Association is governed by a 13-member elected board of directors which establishes the major administrative policies under which the Association's goals, through its programing, are accomplished. The members of the board of directors are elected by the voting body which consists of all member registered professional nurses in good standing (validly licensed as nurses and have paid Association dues).<sup>20</sup> The board of directors of

<sup>17</sup> It should be noted that most of the evidence presented herein, whether in the form of sworn testimony or documentary exhibits, was generally uncontradicted in the record.

<sup>18</sup> The parties herein stipulated that among the Association's membership are persons who would be supervisors as defined in the Act, having the same voting rights and privileges as members as do the nonsupervisory member nurses.

<sup>19</sup> See the testimony of the Association's executive director, Veronica Driscoll, and its deputy director for programs and main witness at the hearing, Catherine Welch.

<sup>20</sup> The evidence shows that the regular employment positions held by various of the directors include "clinical nursing specialist, research associate, director of nursing, assistant professor of nursing, supervisor of a county health department, associate director for continuing education,

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the Association, besides establishing administrative policy, also determines membership qualifications, dues requirements, the Association's administrative and program budget, and appoints members to various standing committees.<sup>21</sup> The Association's programs cover the areas of nursing education, nursing practice and services, legislation, economic and general welfare, and organization services.<sup>22</sup>

#### b. *The Association's staff*

The administrative programming functions of the Association are performed by a staff of paid full-time employees, who are usually themselves licensed professional nurses,<sup>23</sup> and who are not employed by any hospital or health care facility or in fact by any other employer. The Association's chief executive administrative officer is its executive director, who is responsible for implementing all of the Association's program activities including the "Economic and General Welfare Program," also referred to herein as the EGWP, which we are particularly concerned with herein.<sup>24</sup> The executive director is assisted in her duties by a deputy director for programs and a deputy director for administration who are responsible, respectively, for coordinating the Association's program activities and administrative functions. The deputy directors are in turn assisted by the administrative and program staff of the Association. Activities in each of the Association's four major programs are coordinated by

department head for surgical nursing, etc." While the Association maintains, as a general proposition, that the definition of "supervisor" under the Act is not applicable to licensed professional nursing positions below the title of assistant director of nursing of hospital and health care related institutions, it admitted for purposes of this proceeding that "statutory supervisors" have in the past, are presently, and can in the future be elected to membership on its board of directors, and while no supervisory or managerial employee from the Respondent's hospital has ever been elected as a director it is conceivable that this could happen.

<sup>21</sup> The record shows that the Association's board of directors has never included as a member any supervisory or managerial employee employed by the Respondent. Additionally, albeit there have been in the past and now are presently on the board of directors supervisors and managerial employees employed by other hospitals and health care related institutions, the Respondent introduced no evidence which showed that any of these members interfered with, dominated, influenced, or controlled any of the Association's collective-bargaining activities, or that the board members who were supervisors at some competing hospital acted in any way so as to create any conflict of interest, nor that these board members had any motive to compromise the interests of employee-nurses.

Concerning the board of directors' input into the Association's bargaining process, Welch testified that she knew of no instance in which the board of directors vetoed, prohibited, or overrode any decision of any bargaining unit or even considered doing so nor any instance in which the board countermanded a staff decision.

The evidence herein does show however that, in 1977, the Association's board of directors established a special voluntary \$12 "service fee" to be paid by nurses represented by the Association to "assist in providing additional financial resources for implementing the collective bargaining program." This voluntary "fee" was discontinued by the board of directors after 1 year when it was determined that a dues increase which it had approved for submission to the Association's voting body would provide any needed financial support of the program.

<sup>22</sup> The Association also has support services such as, library, research and publications, and public relations.

<sup>23</sup> However, there are exceptions such as the librarian, public relations personnel, and the labor relations representative.

<sup>24</sup> This program encompasses the Association's labor relations functions.

program directors, each of whom is immediately responsible to the deputy director for programs.<sup>25</sup>

#### c. *The Association's Economic and General Welfare Program*

The EGWP under which the Association's collective-bargaining functions are conducted is organized on the basis of four geographical regions within the State of New York. Each region is headed by a regional coordinator who reports to the EGWP director. These regions are additionally staffed by nursing and labor relations representatives who provide assistance to nurses in organizing bargaining units and in negotiating and administering collective-bargaining agreements. The Association's executive director hires all the above employees.<sup>26</sup> The Association also has a "Council on Economic and General Welfare," herein called the Council. The members thereto are appointed by the board of directors and staffing is provided by the director of the program. The Council makes recommendations to the board of directors in the areas covered by the Association's EGWP and serves as an advisory body to the Association's EGWP staff.

The Association's collective-bargaining process functions as follows:

Nurses at a hospital or other health care related facility will contact the Association for preliminary advice and guidance concerning representation. If the Association determines that it is able to provide the requested representational services, it assigns staff members, "nursing representative" and a "labor relations representative," to assist the nurses in accomplishing their representational goal. The nursing and labor relations representatives will meet with the interested nurses, hold organizational meetings to advise the nurses as to the scope of the Association's program, the manner in which it is conducted and the potential outcome for certification and bargaining, and provide any necessary technical guidance and assistance required, i.e., the how and wherefore of obtaining signed authorization cards, etc.

Following Board certification of the Association as the collective-bargaining representative of the nurses in the appropriate unit,<sup>27</sup> the Association provides the nurses unit with technical assistance in the form of model

<sup>25</sup> See C.P. Exh. 8(b) in evidence (Association's organizational chart).

<sup>26</sup> The Association's "Organizational Chart—Economic and General Welfare Program" shows that the EGWP is headed by its director, followed by its regional coordinator (there is one regional coordinator for each of the 4 geographical regions in New York State), and then its nursing representative and labor relations representative (the number of nursing and labor relations representatives varies in each geographical area based on need and availability of trained personnel in these fields).

<sup>27</sup> The particular unit of nurses represented by the Association at a hospital or other health care related facility is referred to by the Association as a Council of Nursing Practitioners although at what stage of the collective-bargaining process this title becomes effective is not clear from the record. These nurses units or "councils" always exclude therefrom statutory supervisors and managerial employees in pursuance of the Act and Board policy.

"rules" suggesting guidelines designed to help them conceive a working structure, i.e., election of unit officers, establishing unit employee committees, and defining committee responsibilities, preparation of bylaws, etc.<sup>28</sup> The nominating committee is elected from among the nurses in the bargaining unit who then elect officers from a slate of candidates prepared by the committee also from among the unit nurses. The negotiating committee is usually constituted from the elected bargaining unit officers or from among the bargaining unit nurses.

In preparation for collective bargaining with the employer the unit nurses develop their own contract proposals through consultation with the Association's nursing and labor relations representatives and through solicitation thereof from the bargaining unit nurses themselves. The bargaining unit decides which of these proposals will be submitted to the employer as demands by the negotiating committee.<sup>29</sup> Contract negotiations themselves are conducted by the negotiating committee with the assistance of the Association's nursing and labor relations representatives as a collective-bargaining team with the labor relations representative often functioning as the "primary negotiator on behalf of the nurses unit."<sup>30</sup>

When negotiations are completed, unit members vote whether to accept or reject the agreement. If the nursing unit approves the contract, the Association generally takes responsibility for the technical aspects of reducing the agreement to written contract form. The agreement is typed, reproduced, and sent back to the unit for review by the nurses unit's representatives and the Association's labor relations representative for accuracy and completeness. If the agreement conforms to the nurses unit's understanding of what was agreed to in the negotiations, the contract is submitted to the employer and to the Association's executive director for execution. Although the executive director generally signs the collective-bargaining agreement on behalf of the Association, he does not have the authority to reject an agreement and her execution thereof "simply signifies that she is satisfied that the agreement conforms to what the bargaining unit has actually negotiated."<sup>31</sup> The record

herein indicates that the above procedure was substantially followed in the Association's initial organizing of the nurses employed at the Respondent's hospital and up through the election and its certification by the Board.

#### *d. The Association's nominating committee*

Pursuant to the Association's bylaws, the duties of the nominating committee are to notify the Association's membership and its "constituent district nursing associations" of the offices to be filled, evaluate persons whose names have been submitted for office, prepare slates of candidates for such offices, and notify the Association's membership of the opportunity to vote as to their selections.<sup>32</sup> It is clear that the nominating committee is one of importance with its members having "great responsibility."<sup>33</sup> The five members of this committee are elected through secret mail ballot by the entire membership of the Association.

The evidence shows that in 1977 the nominating committee included Marilyn McClellan, admittedly a supervisory employee (assistant director, staff development, University of Rochester School of Nursing),<sup>34</sup> and Catherine Foster, whom the Respondent employs and alleges to be a supervisor under the Act.<sup>35</sup>

#### *e. Special committees*

Evidence was offered by the Respondent concerning particular "Special Committees" and "Task Forces." Members of the "Special Committees" and "Task Forces" of the Association are appointed by the board of directors. The "Special Committee to Consider Concerns of Directors of Nursing Practice and Services" was created to study the impact of the Association's collective-bargaining activities upon the right of directors of nursing services to full participation in the activities of the Association and whether the collective-bargaining program of the Association should be separate, in effect, whether there should be two associations. The committee recommended, in substance, that there be continued "full participation by Directors of Nursing Practices and Services" in the Association, that legal assistance be provided to any director of nursing forced or coerced to resign from membership in the Association, and that the Association develop a model employment contract for directors of nursing and assist them in securing such contracts. While there was some dispute among the parties as to just how many members of this committee were supervisory employees, it is clear that at least two of the six members were.<sup>36</sup>

<sup>28</sup> According to the uncontradicted testimony of Catheryne Welch, each nurses unit makes the ultimate decisions as to what rules to adopt and the method for establishing nominating and negotiating committees. Further, Welch testified that the Association does not advise the unit as to who should be on these committees nor does it have a vote in the establishment thereof.

<sup>29</sup> Welch testified uncontravertedly that the proposals to be negotiated during collective bargaining with the employer are determined by the nurses units themselves, not the Association's nursing or labor relations representatives, and are not submitted to the Association for approval. Even when Association staff are conducting negotiations, their authority to bargain on behalf of the unit is always limited by the ultimate authority of the nurses unit to authorize the negotiation of all proposals and to accept or reject proposed modifications of unit proposals.

<sup>30</sup> According to the evidence, even though the labor relations representative may assume the function of primary negotiator because of his expertise in this area, the negotiating committee may preclude this if the nurses unit so desires.

<sup>31</sup> Both Catheryne Welch, the Association's deputy director for program, and Jeanette Coane, employed by the Association as a nursing representative, testified that they knew of no instance in which the Association's executive director, or anyone authorized to sign a collective-bargaining agreement on her behalf, had refused to execute a bargaining agreement submitted for such signature.

<sup>32</sup> See the testimony of Catheryne Welch.

<sup>33</sup> See the testimony of Ruth Harper, executive director of District 14, a constituent district nursing association of the NYSNA.

<sup>34</sup> Geographically, the school of nursing is located over 300 miles from the Respondent's hospital.

<sup>35</sup> While the Association does not concede Foster's supervisory status, it maintains that even if she were a statutory supervisor this would have no effect on its ability to represent the Respondent's nurses in an appropriate unit for purposes of collective bargaining. It should be noted that Foster was chairwoman of this committee and at the same time was also president of District 14.

<sup>36</sup> Louise Pam and Audrey Byrnes.

The "Task Force on Impediments to Quality Nursing Care" was created to prepare, for submission to the Association's voting body, a report concerning the Association's no-strike policy. The task force's final report contained recommendations expressly leaving to each bargaining unit the final decision as to whether to withhold its services in a particular case. The task force itself exercises no authority unilaterally to implement its proposals since the Association's membership, its voting body, would have final approval as to any collective-bargaining matters within the scope of its study and thereafter the individual bargaining units of employee-nurses would decide what to do if the recommendations were accepted. The evidence shows that while none of the members of this task force was a supervisory or managerial employee of the Respondent some members were supervisory employees at other public or private hospitals or institutions.<sup>37</sup>

Another task force, "On Organizational Implication of the 1985 Proposal," a six-member group, included no supervisory or managerial employees of the Respondent.<sup>38</sup> This task force was an advisory body charged with studying whether the Association should extend membership privileges to licensed practical nurses who do not hold baccalaureate degrees. The task force recommended against so extending Association membership.

#### *f. The Council on Economic and General Welfare*

This is a seven-member Council which serves, pursuant to the Association's bylaws, in an advisory capacity to the Association's board of directors who appoint its members. The EGW Council also advises the EGWP staff. According to the uncontradicted testimony of Catheryne Welch, the Council does not implement the collective-bargaining program of the Association, does not participate in organizing or negotiating on behalf of the Association, and has no authority for the conduct of any collective-bargaining activity. While there is some dispute as to the supervisory or managerial status of two of the seven members of the EGW Council, it is admitted that supervisory or managerial employees can be appointed to membership on the Council by the Association's board of directors.

#### **2. The American Nurses Association,<sup>39</sup> the New York State Nurses Association, and the Nurses Association of the Counties of Long Island, Inc., District 14<sup>40</sup>**

The New York State Nurses Association (ANA) is a "constituent" of the American Nurses Association and District 14 a "constituent" of the New York State Nurses Association.<sup>41</sup> Welch testified that a "constituent

organization" is one whose "constitution and bylaws are in harmony" with each other and, in the case of District 14's "constituency" with the New York State Nurses Association, has "been approved by a majority vote of the board of directors of this Association." Welch continued that the ANA, the Association, and District 14 are autonomous and separate nonprofit membership organizations, each having its own constitution and bylaws, its own membership, its own staff and programing, and its own dues requirements, with "constituent" status obtained on a voluntary basis.<sup>42</sup> However, the New York State Nurses Association collects its own membership dues as well as those of the American Nurses Association and the district nurses associations, where applicable, in one payment and then forwards the respective dues amounts to the appropriate nurses association. The reason therefor appears to be that the NYSNA has its own computerized payroll equipment which readily lends itself to this arrangement.<sup>43</sup> It is clear from the record that a part of the dues paid to the association is used to further the association's EGW program.

Welch in describing the interaction between the ANA and the NYSNA testified that,

Periodically and from time to time the two organizations work collaboratively on issues which fall within their similar statements of purpose and functions, but each is a separate organization and functions in that fashion.

The Association has an "advisory council" composed of its "president" and the president or executive director of each of the 18 constituent districts and which meets quarterly "for the sharing of information, for reacting to ideas, to bring concerns from local areas." While the "advisory council" does not "make or implement policy" it "may suggest to the board [of directors] or recommends." Ruth Harper, District 14's executive director, testified that its representatives to the "advisory council" had never made a suggestion concerning the Association's EGWP at any of these meetings.

Concerning the "constituency" relationship between the Association and District 14, Harper testified that it,

... really is that we are all bound by the same ethical concept, the same general purpose for which we exist and that we don't vary and that is to elevate the standards of the profession so we may render the best care to the public.<sup>44</sup>

<sup>37</sup> The evidence indicates that of 21 persons who have served as members of this task force at least 4 were or now are supervisory employees.

<sup>38</sup> The record does not establish whether any of the six members of this task force were supervisors or managers at other hospitals.

<sup>39</sup> The American Nurses Association is also referred to therein as ANA.

<sup>40</sup> The Nurses Association of the Counties of Long Island, Inc., District 14, is referred to hereinafter as District 14.

<sup>41</sup> NYSNA has 18 constituent districts throughout the State of New York. The Respondent's hospital is located within the geographical area encompassed by District 14.

<sup>42</sup> Welch testified that the Association "has no requirement to simultaneous or concurrent membership in any district association or the American Nurses Association." However, according to the testimony of Ruth Harper, the American Nurses Association does require "tri-level" membership, in the American Nurses Association, the New York or particular State Nurses Association, and the constituent district nurses association if applicable.

<sup>43</sup> Harper testified that the Association's collection of District 14 membership dues without charge to the District is one of the benefits it derives from its "constituency" status with the Association.

<sup>44</sup> Harper related that, while there is no direct relationship between District 14 and the American Nurses Association, District 14 does receive bulletins and newsletters about nursing or nursing practice from the

*Continued*

She stated that, while District 14 has its own bylaws, any proposed changes thereof are submitted to the Association for approval.<sup>45</sup> Harper added:

In essence we conform with the general statements of the purpose for these associates and of all these levels and I think they are in harmony and the membership categories must be uniform . . . registered nurse duly licensed, eligible to practice.

Harper continued that District 14 programs, pursuant to its bylaws, include promoting nursing standards as defined by the ANA (educational programs concerning statements of nursing standards and practice), participating in and supporting the NYSNA's legislative program (but not including lobbying which District 14 is not equipped financially or personnel-wise to do), and encouragement and recruitment of qualified persons to enter the nursing field (maintaining a speakers' bureau which provides speakers to nursing schools, high schools, and private or public groups, and as part of this program District 14 prepares and issues a directory of nursing schools). Harper stated that District 14 also maintains and publishes a "nurses' professional registry" which is a placement service for private duty nurses under standards set by the Association.<sup>46</sup>

District 14 also prepares an annual survey of personnel practices and policies at the various hospitals in its geographical area and makes the survey available to individual nurses as well as to hospitals and other health care institutions within its jurisdiction. Harper testified that the purposes of the survey are: To collect "current accurate statistical data about nurses employment in our geographic area," to "assist nurses and others to improve their employment situations," and to "update the information presently in our files." She added that this survey is prepared with the "excellent cooperation of the hospital directors of nursing and also some of the larger nursing homes." Information concerning nurses' salaries at the various hospitals is also set forth in an issue of District 14's membership newsletter.

Harper testified that District 14 during the implementation of its programs disseminates information about both the ANA and the NYSNA for membership promotional purposes and supplies trilevel membership application forms when requested. Her testimony indicates that, while District 14 encourages membership in both ANA and NYSNA, its membership promotions are primarily directed towards its own District 14 membership.

According to Harper while it is one of the purposes of District 14 to improve the working conditions of nurses in the context of "improving nurses conditions of practice," District 14 does not function as a labor organiza-

tion, does not engage in any collective-bargaining activities itself, nor does it have any input into the NYSNA's collective-bargaining activities. She stated that District 14 does not engage in "any specific activities that are solely limited to improving working conditions of its members."<sup>47</sup> Catheryne Welch testified similarly.

Additionally and concerning District 14 and the NYSNA, the record shows: that Catherine Foster, a supervisory nurse employed by the Respondent, was president of District 14 from May 1976 to May 1978 and during this time she also was chairman of the NYSNA's nominating committee in 1977; that various other members of District 14 held or now hold positions on other NYSNA's committees, i.e., Sister Mary Louise Murray is chairman of the NYSNA's nominating committee, Patricia Barry belongs to the NYSNA council on legislation, Dr. Margaret McClure serves on the NYSNA's Special Committee on the Nurse Practice Act, and Esther Chanis is District 14's designee to the NYSNA's Education Planning Committee. The Respondent also offered evidence to show that James Vanderveld and Dr. Margaret McClure, members of District 14, attended the Association's 1977 convention during which the issue of the Association's no-strike policy was discussed and voted upon.

### C. Analysis and Conclusions

In *Sierra Vista Hospital, supra*, the Board noted (241 NLRB at 623, 633):

But, while the presence of supervisors in an association does not bear upon its "labor organization" status, the identity and role of those supervisors in the labor organization may operate, nonetheless, to disqualify it from bargaining in certain instances.<sup>[48]</sup> Central factors involved in considering this issue are the employees' right to a collective-bargaining representative whose undivided concern is for their interests and the employer's right to expect loyalty from its supervisors. Active participation by the employer's own supervisors may, in a given case, contravene either or both of these legitimate interests.<sup>[49]</sup> Indeed, we have held that an employer has a duty to refuse to bargain where the presence of that employer's supervisors on the opposite side of the bargaining table poses a conflict between those interests.<sup>18</sup>

the NYSNA (executive director, deputy director for programs, and the EGWP director), various area hospitals' directors of nursing and conference group, and District 14 members. The meeting was chaired by Harper and was convened to explore some of the aspects of the NYSNA's EGWP and the role of the directors of nursing in such a program.

<sup>48</sup> The Board in *Sierra Vista Hospital, supra*, explained:

This potential for disqualification stems from an inherent statutory concern that "[e]mployees have the right to be represented in collective-bargaining negotiations by individuals who have a single-minded loyalty to their interests,"<sup>16</sup> and the identity and role of supervisors admitted to membership in a labor organization can, in certain circumstances, *compromise the statutory interest*. Thus, active participation in the affairs of a labor organization by supervisors employed by the employer with whom that labor organization seeks to bargain can give rise to question about the labor organization's ability to deal with the employer at arm's length. [Emphasis supplied.]

<sup>16</sup> *Nassau and Suffolk Contractors' Association, Inc., et al.*, 118 NLRB 174, 187 (1957).

ANA, competes for special project moneys from the ANA, and can participate in special programs such as "a creative nursing award." Harper added that District 14's relationship with ANA is "informational, historical, friendly, cooperative, we subscribe . . . in all ways with the code of ethics which is adopted on the national level."

<sup>45</sup> This does not include, however, changes concerning the amount of dues charged to its membership.

<sup>46</sup> The NYSNA maintains its own registry for private duty nurses, publishes standards of review of nursing registries, and supplies information on private duty nurse rates throughout the State, although District 14 sets its own fee rates for private duty nurses in its geographical area.

<sup>47</sup> Harper testified about one of District 14's organizational subgroups, "the nurse service administrators conference group," which held a meeting on October 4, 1977. Attending this meeting were representatives of

ests.<sup>[49]</sup> Indeed, we have held that an employer has a duty to refuse to bargain where the presence of that employer's supervisors on the opposite side of the bargaining table poses a conflict between those interests.<sup>18</sup>

The active, internal union participation of supervisors of a third-party employer (i.e., an employer other than the one with whom the labor organization seeks to bargain) does not present the danger that an employer may be "bargaining with itself." But it may operate, nonetheless, to disqualify a labor organization from acting as a bargaining representative for particular employees. Although, in such cases, the legitimate interest of an employer in the loyalty of its supervisors is not in issue (the active supervisors are not its own), the presence of supervisors of third-party employers may impinge upon the employees' right to a bargaining representative whose undivided concern is for their interests . . . because of the possible relation between the employer with whom bargaining is sought and the employer or employers of the supervisor participating in the bargaining process. Thus, we have held that an employer may lawfully refuse to bargain with a bargaining representative which itself was in a competing business.<sup>20</sup>

<sup>18</sup> *Nassau and Suffolk Contractors' Association, supra*; *Banner Yarn Dyeing Corporation*, 139 NLRB 1018 (1962); *Welsbach Electric Corporation*, 236 NLRB 503 (1978).

\* \* \*

<sup>20</sup> *Bausch & Lomb Optical Company*, 108 NLRB 1555 (1954).<sup>[50]</sup>

While recognizing that an employer who establishes a disqualifying conflict of interest may lawfully refuse to bargain, the Board in *Sierra Vista Hospital, supra*, also held that "the burden on the employer to show such conflict is a heavy one." The Board stated:

<sup>49</sup> *Sierra Vista Hospital, Inc., supra* at 633, fn. 17:

We emphasize that we are here concerned with supervisors who have an active role in and some authority with respect to directing the affairs of a labor organization. Cf. *International Organization of Masters, Mates and Pilots, supra*; *Allen B. Dumont Laboratories, Inc.*, 88 NLRB 1296 (1950).

<sup>50</sup> The Board continued:

Under the foregoing analysis, it is conceivable that the presence of even one supervisor on CNA's [California Nurses Association] board of directors, if employed by Respondent, could present a danger that unit employees' interests might not be single-mindedly represented. That would depend on the role, if any, of that supervisor in CNA's internal affairs. It is also conceivable that the active involvement in CNA of supervisory nurses employed by other employers may, in some circumstances, present a conflict of interest requiring that CNA be disqualified from representing a particular unit for which it was certified. That would depend on a demonstrated connection between the employer of those unit employees and the employer or employers of those supervisors, and, with respect to this possibility, we stress that the participation of supervisors (of third-party employers), even if constituting a majority of a nurses' association's board of directors, would not in and of itself necessarily require disqualification, absent some other demonstrated conflict of interest, for we do not assume an "inherent" conflict between supervisors and employees in the bargaining process. [*Sierra Vista Hospital, Inc., supra* at 633 (emphasis supplied).]

There is a strong public policy favoring the free choice of a bargaining agent by employees. The choice is not lightly to be frustrated. There is a considerable burden on a nonconsenting employer, in such a situation as this, to come forward with a showing that danger of a conflict of interest interfering with the collective bargaining process is clear and present.<sup>22</sup>

<sup>22</sup> *N.L.R.B. v. David Buttrick Company*, 399 F.2d 505, 507 (1st Cir. 1968). There can be no question with regard to a conflict-of-interest defense that the Board agrees with the Court of Appeals for the First Circuit's formulation of a respondent's burden of showing a "clear and present danger" and that the Board will strike that defense when a respondent fails to carry its burden.

The Respondent contends that the New York State Nurses Association should be disqualified from acting as the collective-bargaining representative of the Respondent's licensed professional nurses in an appropriate unit because of a conflict of interest due to the Association's being "influenced, directed, dominated and/or controlled by persons who occupy supervisory and/or management positions" within the Respondent's own hospital or in other hospitals or health care institutions. I do not credit this contention. The Respondent has clearly failed to sustain its "considerable burden . . . in such a situation as this, to come forward with a showing that danger of a conflict of interest interfering with the collective bargaining process is clear and present."<sup>51</sup>

Initially, it is clear from the record in this case that no supervisory or managerial employee of the Respondent has ever been an official or director of the NYSNA. Further, while it is true that statutory supervisors employed by third-party employers have been and are now members of the Association's board of directors the evidence herein shows that, as a practical matter, the board of directors has no input into the NYSNA's collective-bargaining process. Bargaining unit decisions are not brought to the board of directors' attention for review or action and Welch testified uncontradictedly that she knew of no instance when the board of directors had considered or actually vetoed or overridden any bargaining unit decision.

The uncontradicted evidence herein further shows that the "Councils of Nursing Practitioners," the bargaining units of nurses at the various hospitals and other health care facilities, control the bargaining process. The bargaining unit adopts its own rules for conducting bargaining unit business and elects a negotiating committee from among unit members. It should be particularly noted that these bargaining units are composed of licensed professional staff nurses excluding all statutory nurse supervisors and managers. The Association does not advise the unit concerning the composition of the negotiating committee, and does not have a vote in establishing the committee.<sup>52</sup> Proposals for bargaining are generated by the

<sup>51</sup> *Sierra Vista Hospital, Inc., supra*.

<sup>52</sup> At the Respondent's hospital the bargaining unit nurses elected their own negotiating committee consisting exclusively of members of the bargaining unit.

unit itself and are not submitted to the Association for approval. The Association's labor relations representatives, who generally act as chief negotiators on behalf of the individual bargaining units, are paid staff employees of the Association and are not supervisors or managerial employees of any hospital, including the Respondent's. However, as the evidence indicates, at times the bargaining unit will elect to have a member of the negotiating committee present a particular contract proposal to the employer at the bargaining session. Members of the bargaining unit retain authority to authorize the negotiation of all proposals and to accept or reject proposed modifications of unit proposals. When negotiations are completed, acceptance or rejection of the proposed agreement lies solely with the bargaining unit.

Additionally, the evidence clearly shows that the Association's role in the bargaining process is purely advisory and, to the extent that the Association's staff are involved in bargaining, no supervisory or managerial personnel affect the process. The Association's staff<sup>53</sup> who advise the unit regarding organizational aspects and bargaining are full-time employees of the Association and are not employed elsewhere. The executive director of the Association, who generally executes the collective-bargaining agreements on behalf of the Association, is also a full-time Association employee and is not a supervisor or manager of any hospital or health care related institution. Moreover, her authority with respect to collective bargaining is purely ministerial, as she does not have the authority to reject a collective-bargaining agreement submitted for execution.

Significantly, the Board has rejected employer's conflict-of-interest contentions in a number of cases in which bargaining units retain similar control over the collective-bargaining process as do the Association's bargaining units.<sup>54</sup>

As to the Respondent's own supervisory and managerial employees, the Respondent alleges that because Catherine Foster, a supervisor at its hospital, was "President of District 14, which compiles wage and area practice surveys, sets private duty nurse fees and otherwise assists in [NYSNA] EGW activities, and Chairman of the [NYSNA] Nominating Committee . . . these relationships forced an intolerable compromise of loyalties that is precisely the kind of conflict of interest both the Board and the Courts have condemned." I do not agree.

The evidence herein clearly shows that District 14 is not a labor organization, does not engage in collective bargaining itself, and does not influence the collective-bargaining process or programs of the NYSNA. The Board has expressly rejected employer's conflict of interest contentions based upon the activities of the employer's own alleged supervisors in constituent districts of state nurses' associations.<sup>55</sup>

<sup>53</sup> Usually the Association's nursing and labor relations representatives.

<sup>54</sup> See *Abington Memorial Hospital, supra*; *Lodi Memorial Hospital Association, Inc., supra*; *Rockford Memorial Association d/b/a Rockford Memorial Hospital*, 247 NLRB 319 (1980); *The Sidney Farber Cancer Institute*, 247 NLRB 1 (1980); *Lancaster Osteopathic Hospital Association, Inc.*, 246 NLRB 600 (1979); *Baptist Hospitals, Inc., d/b/a Western Baptist Hospital*, 246 NLRB 170 (1979).

<sup>55</sup> In *Baptist Hospitals, Inc., supra* at 171, the Board stated:

Moreover, the mere fact that supervisory or managerial employees of the Respondent hold membership in the Association, attend voting sessions of the Association's conventions, or vote by secret ballot where provided for concerning Association policy and functioning in and of itself does not present the "clear and present danger" of conflict with employees' Section 7 bargaining rights envisioned by the Board's Decision in *Sierra Vista, supra*.<sup>56</sup>

The Respondent also argues that the Association is disqualified from bargaining as the representative of the appropriate nurses' bargaining unit because of the activities of supervisors or managers of other employers. The Respondent states that, at least from 1976 through 1978, a majority of the members of the Association's board of directors have been "statutory supervisors employed at hospitals and other health care institutions" and since, in addition, "important [Association] policy formation committees are laden with statutory supervisors" including the "Special Committee to Consider Concerns of Directors of Nursing Practice and Services," the "Task Force on Impediments to Quality Nursing Care," and the NYSNA nominating committee, supervisors at all levels are thus involved "without restriction" in every important phase of the Association's operations, "including financial matters, the life blood of EGW and policy making directly affecting EGWP."

As indicated hereinbefore the Board in *Sierra Vista Hospital, Inc., supra*, stated:

[W]e stress that the participation of supervisors (of third-party employers), even if constituting a majority of a nurses' association's board of directors, would not in and of itself necessarily require disqualification, absent some other demonstrated conflict of interest, for we do not assume an "inherent" conflict between supervisors and employees in the bargaining process.

Thus, it is clear that the employer must show some connection between the employer of those unit employees and the employer or employers of those supervisors.<sup>57</sup> It is also clear that it is insufficient to establish disqualification of the Association herein to bargain simply because one, a few, or even a majority of its board of directors are supervisors or managers of some other hospital or to suppose some conflict when in fact none exists or has ever occurred before. The record in this case is devoid of any evidence showing that any member of the Association's board of directors has ever interfered with, dominated, or controlled any of the Association's collective-bargaining activities. Further, the Respondent failed to show any evidence that a "supervisory" member of the

While there are some supervisors of the Employer and of Lourdes Hospital who serve as officers and directors of [Kentucky Nurses Association]'s District 5, the record indicates that there is nothing in KNA's organizational structure which allows for district officers and directors to interfere with the collective-bargaining process of a local unit.

Also see *Lancaster Osteopathic Hospital Association, Inc., supra*; *St. Rose de Lima Hospital, Inc.*, 223 NLRB 1511 (1976).

<sup>56</sup> Also see *Lancaster Osteopathic Hospital, supra*; *Healdsburg General Hospital*, 247 NLRB 212 (1980).

<sup>57</sup> *Sierra Vista Hospital, Inc., supra*.

Association's board of directors employed at another hospital "has used or could use his or her position to influence that board to advance the competitive position of any hospital as against the Employer."<sup>58</sup>

Significantly, the Board has repeatedly rejected an employer's assertions of disqualifying conflicts of interests where "third-party" supervisors were or had been members of a nurses' association's board of directors absent a showing by an employer of proof of a connection between the hospital and the employers of such supervisors sufficient to evidence a conflict of interest that would compromise the integrity of the bargaining process.<sup>59</sup> In the instant matter the Respondent has failed to show either that its own supervisors serve on the Association's board of directors, or that there exists a connection between the Respondent's hospital and the employers of the supervisors who are now or have served previously on the Association's board of directors which could compromise bargaining.

Furthermore, in considering the Respondent's other contentions it should be noted that the Board in *The Sidney Farber Cancer Institute*, *supra*, stated:

As to the Employer's assertions that the MNA board of directors' various powers, such as those of appointment, approval, and fiscal control, amount to supervisory domination, we find these functions of organizational oversight to be both remote and speculative in relation to the local chapters' bargaining activities. Something more than mere potential for influence must be shown to warrant disqualifying a labor organization. [247 NLRB at 4.]

Thus the Board has expressly rejected the Respondent's argument that the "power of the purse" as represented in the Association's board of directors' authority to adopt, approve, or modify the Association's annual operating budget creates a potential for interference with collective bargaining which requires disqualification of the Association.

The Respondent also points to the presence of supervisory or managerial employees of other hospitals or health care related institutions on the Association's "Special Committee to Consider Concerns of Directors of Nursing Practice and Services" as creating a clear and present danger of conflict with employee rights. This committee recommended, in substance, that the Association allow the continued full participation of the directors of nursing practice and services in the Association, provide legal and employment assistance to directors of nursing practice and services, and challenge and publicize any discriminatory action by employers against these directors of nursing and services because of their Association membership.

In *Healdsburg General Hospital*, *supra*, a case involving somewhat similar circumstances, the Board rejected the employer's contention that because the California Nurses Association (CNA) maintained a division devoted to the

interests of supervisors (advising supervisory nurses of their rights and responsibilities as members of management and concerning their own contract negotiations with their hospital employers, and representing them in their employment relations with the hospitals, all at high cost) it is "influenced, dominated and controlled" by member supervisors. The employer therein asserted that the diversion of sorely needed funds from bargaining unit employees' needs to the promotion of supervisors' interests presents a "classic conflict of interest for, if CNA has allegiance to supervisors, that allegiance compromises its representation of bargaining unit employees at the bargaining table." The employer further asserted that supervisors, because they are represented by CNA and their interests are protected by CNA, owe allegiance to CNA as well as to their employer and that such a relationship, inevitably, has an adverse impact on management.

The Board stated in the *Healdsburg General Hospital* case:

[T]he Employer claims that, because CNA is influenced by supervisors, it cannot give its undivided loyalty to the interests of employees. In this the Employer alleges that CNA is, in fact, influenced by supervisors; that CNA represents "all" nurses including supervisors; and that such representation is costly and controversial. Even assuming that to be the case, the Employer failed to establish that any of these factors creates a conflict of interest sufficient to prevent CNA from acting as bargaining representative. As emphasized, the Board in *Sierra Vista* stated that "there is no inherent conflict between supervisors and employees in the bargaining process." The Employer apparently takes the position that there is and offers the above evidence as proof. However, it is clear that the internal structure and problems of CNA, as presented by the Employer, are irrelevant to our inquiry absent some showing of a particular conflict. None has been shown by the Employer either in its offer of proof or in its brief. [247 NLRB at 214.]

Thus it is not enough for an employer to show that supervisors participate or even "influence" the Association. The respondent must show a "direct" conflict of interest, "that a danger of a conflict of interest interfering with the collective bargaining process is clear and present."<sup>60</sup> A nurses association's interest in supervisory nurses' problems does not evidence a "clear and present" danger of conflict of interest to disqualify it from representing rank-and-file nurses.

Additionally, as stated by the Board, in *The Sidney Farber Cancer Institute*, *supra* at 4:

We likewise find the Employer's assertion that its supervisors may hold office or positions of authority in MNA at some future time entirely too speculative to warrant disqualification of MNA. Nor is that

<sup>58</sup> *Healdsburg General Hospital*, *supra* at 214.

<sup>59</sup> See *Healdsburg General Hospital*, *supra*; *The Sidney Farber Cancer Institute*, *supra*; *Lancaster Osteopathic Hospital Association, Inc.*, *supra*; *Baptist Hospitals, Inc.*, d/b/a *Western Baptist Hospital*, *supra*.

<sup>60</sup> *Healdsburg General Hospital*, *supra*.

assertion probative of establishing the existence of a clear and present danger of conflict.<sup>61</sup>

In support of its contentions the Respondent introduced evidence that the NYSNA submits the names of nominees to the New York State Education Department for appointment to that State's board of nursing. The Board in *St. Rose de Lima Hospital, Inc.*, *supra*, involving a similar allegation concerning the Nevada Nurses Association's authority to nominate registered nurses for appointment to the Nevada State Board of Nursing, found "this contention entirely too speculative and, hence, lacking in merit."

Based upon all of the foregoing, I find that the New York State Nurses Association is not disqualified because of an alleged conflict of interest from representing the Respondent's employees in an appropriate unit for the purposes of collective bargaining. The Respondent has failed to sustain its burden of showing that danger of a conflict of interest interfering with the collective-bargaining process is clear and present.<sup>62</sup>

#### *D. The Request To Bargain and the Respondent's Refusal*

As noted hereinbefore, the Board certificated the Association as the collective-bargaining representative of the Respondent's licensed professional nurses in an appropriate unit on February 21, 1978. On or about April 18, 1978, the Association requested the Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the unit. Commencing on or about April 21, 1978, and continuing at all times thereafter to date, the Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in the unit. As found above the Association is *not* disqualified because of any conflict of interest from acting as such certified bargaining representative.

Accordingly, I find that the Respondent has, since April 21, 1978, and at all times thereafter, refused to bargain collectively with the Association as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

#### IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

<sup>61</sup> Also see *Baptist Hospitals, Inc.*, d/b/a *Western Baptist Hospital*, *supra*; *American Arbitration Association, Inc.*, 225 NLRB 291 (1976).

<sup>62</sup> *Sierra Vista Hospital*, *supra*.

#### V. CASE 29-RC-3989

Subsequent to the Board's certification of the Association, on February 21, 1978, as the bargaining representative of all the Respondent's licensed professional nurses in an appropriate unit in Case 29-RC-3989, the Respondent on July 17, 1978, filed a motion to revoke certification alleging *inter alia* that the Association is influenced, dominated, and controlled by supervisors and/or managers who serve as both officers and directors of the Association and therefore the Association is not a bona fide labor organization and is disqualified from acting as a bargaining representative. From all of the foregoing I deny the Respondent's motion to revoke certification in Case 29-RC-3989.

#### VI. THE REMEDY

Having found that the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, I shall recommend that it cease and desist therefrom, and, upon request, bargain collectively with the Association as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, the initial period of certification shall be construed as beginning on the date the Respondent commences to bargain in good faith with the Association as the recognized bargaining representative in the appropriate unit.<sup>63</sup>

#### Additional Remedies Sought by the Association

The Association seeks additional remedial relief herein because "The Hospitals 'Domination' Defense was Plainly Frivolous." As noted hereinbefore the Association seeks the following additional remedies: (1) expenses incurred in the investigation, preparation, presentation, and conduct of these cases, including reasonable counsel fees, witness fees, transcript and record costs, travel expenses and per diem, and other reasonable costs and expenses; (2) the hospital should be ordered to mail copies of the "Notice to Employees" to each of the employees in the bargaining unit at his or her home; (3) the hospital's personnel administrator should be ordered personally to read the "Notice to Employees" to the members of the bargaining unit at the hospital, in the presence of representatives of the Association and the Board; (4) the Association should be granted access to the hospital's bulletin boards and premises during the entire period of contract negotiations; (5) all terms of any contract agreed to in collective bargaining, including but not limited to wages and benefits, should be made retroactive to the date of the election; and (6) the hospital should be ordered to reimburse the Association for lost dues and initiation fees

<sup>63</sup> *Brookside Manor, Inc. and Willowbrook, Inc.*, 255 NLRB 1134 (1981); *Burnett Construction Company*, 149 NLRB 1419 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817; *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962).

since the election and to reimburse employee-members who have paid such dues and initiation fees to the Association while the hospital was engaged in its unlawful refusal to bargain.

The Board in *Tiidee Products, Inc.*, 194 NLRB 1234 (1972), held that where a respondent engaged in frivolous litigation that is clearly unwarranted and meritless on its face, it should be compelled to reimburse the Board and the charging party for all expenses incurred in the investigation, preparation, and presentation of the case.<sup>64</sup> The Board's purpose therefore was to discourage frivolous litigation and to "prevent the employer from having a free ride during the period of litigation."<sup>65</sup> This remedy has also been imposed where an employer follows a pattern of unlawfully resisting union organizing or engages in "flagrant repetition of conduct previously found unlawful" and to that end unduly burdens the processes of the Board and the courts.<sup>66</sup>

However, in examining the propriety of awarding litigation and organizational expenses against a respondent, the Board has distinguished between "patently frivolous" defenses<sup>67</sup> to unfair labor practice charges and defenses which are "debatable." In the latter situation the Board has held that reimbursement of litigation and organizational expenses is inappropriate, even when the unfair labor practices are flagrant and repetitious.<sup>68</sup> Also the Board has consistently followed its rule that litigation and organizational expenses are not to be awarded against a respondent unless the defenses raised are patently frivolous.<sup>69</sup> An additional prerequisite to the awarding of organizational costs was set forth in *Winn-Dixie Stores, Inc.*, 224 NLRB 1418 (1976). The Board there held that it will not award organizational costs to a union unless the union proves that the employer's unfair labor practices were causally related to any extraordinary organizational expenses incurred by the union.

In view of the above, and the record herein as a whole, I do not find that the Respondent's actions nor its defenses were so "patently frivolous" as to warrant the additional and extraordinary remedies sought by the Association herein and therefore deny the Association's motions and applications for such relief. I also deny as unnecessary the Association's request to reopen the record "to receive evidence of Hospital unfair labor practices and election interference which were excluded at the hearing but directly revealed the hospital's improper

motive throughout this proceeding."<sup>70</sup> Even assuming that the evidence to be produced would prove what the Association alleges it would show in its offer of proof, I do not believe that this would warrant the imposition of the above remedies nor change my findings thereon.

#### CONCLUSIONS OF LAW

1. North Shore University Hospital is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. New York State Nurses Association is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time registered professional nurses regularly scheduled to work 22-1/2 hours or more per week, including all those authorized by permit to practice as registered nurses, employed by the employer at 300 Community Drive, Manhasset, New York; excluding all department heads, administrative directors, directors, associate directors, assistant directors, all supervisors, clinical supervisors, all clinicians, all instructors, all specialists, operating rooms nurse specialists, all coordinators, head nurses, assistant head nurses, all casual employees, temporary employees, confidential employees, managerial employees, all other employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since February 21, 1978, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about April 21, 1978, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of the Respondent in the appropriate unit, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, the Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The unfair labor practices found above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the basis of the foregoing findings of fact, conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

<sup>64</sup> These include reasonable counsel fees, witness fees, transcript and record costs, travel expenses, and other costs and expenses.

<sup>65</sup> *International Union of Electrical, Radio and Machine Workers, AFL-CIO [Tiidee Products, Inc.] v. N.L.R.B.*, 426 F.2d 1243, 1251 (D.C. Cir. 1970).

<sup>66</sup> *Food Store Employees Union, Local No. 347, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO v. N.L.R.B.*, 476 F.2d 546, 551 (D.C. Cir. 1973).

<sup>67</sup> *Tiidee Products, Inc.*, *supra*.

<sup>68</sup> *Heck's Inc.*, 215 NLRB 765 (1974); *Metco, Incorporated*, 205 NLRB 875 (1973), *enfd.* 496 F.2d 1342 (5th Cir. 1974); *Lang Towing, Inc.*, 201 NLRB 629 (1973).

<sup>69</sup> *Betra Manufacturing Company*, 233 NLRB 1126 (1977); *Schuck Component Systems, Inc.*, 230 NLRB 838 (1977); *The Hartz Mountain Corporation*, 228 NLRB 492 (1977); *Winn-Dixie Stores, Inc.*, *supra*; *Royal Typewriter Company, etc. v. N.L.R.B.*, 533 F.2d 1030 (8th Cir. 1976). In *Sabine Towing & Transportation Co., Inc.*, 224 NLRB 941 (1976), this rule was followed even though the employer had committed similar unfair labor practices in the past.

<sup>70</sup> While such evidence was excluded by me at the hearing, I did allow the Association to make an offer of proof thereof.

ORDER<sup>71</sup>

The Respondent, North Shore University Hospital, Manhasset, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with New York State Nurses Association, as the exclusive bargaining representative of its employees in the following appropriate unit:

All full-time and regular part-time registered professional nurses regularly scheduled to work 22-1/2 hours or more per week, including all those authorized by permit to practice as registered nurses, employed by the employer at 300 Community Drive, Manhasset, New York; excluding all department heads, administrative directors, directors, associate directors, assistant directors, all supervisors, clinical supervisors, all clinicians, all instructors, all specialists, operating rooms nurse specialists, all coordinators, head nurses, assistant head nurses, all casual employees, temporary employees, confidential employees, managerial employees, all other employees, guards and supervisors as defined in the Act.

<sup>71</sup> In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections hereto shall be deemed waived for all purposes.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Manhasset, New York, hospital copies of the attached notice marked "Appendix."<sup>72</sup> Copies of said notice, on forms provided by the Regional Director for Region 29, after being duly signed by the Respondent's representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the motion to revoke certification in Case 29-RC-3989 be, and it hereby is, denied.

<sup>72</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."